STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 2006
v	No. 258334 Wayne Circuit Court
CEDRIC RENAUD GILMORE, Defendant-Appellant.	LC No. 04-005032-01

Before: Sawyer, P.J., and Wilder and H. Hood*, JJ.

H. Hood, J. (*concurring*).

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to a two-year prison term for the felony-firearm conviction, life imprisonment for the first-degree murder, assault with intent to commit murder, and armed robbery convictions, and one to five years for the felon-in-possession conviction. We affirm defendant's convictions and remand for resentencing on the assault and armed robbery convictions.

I. Facts

Defendant's convictions arise from the shooting death of Rashawn Coleman ("the victim") and the armed robbery and nonfatal shooting of Drew Montgomery in Detroit. Montgomery testified that, on September 23, 2002, he and the victim were sitting in the victim's living room listening to music when defendant arrived. Defendant stayed for a while, then left the house and returned a few minutes later with a gun. Defendant shot the victim, and then pointed the gun at Montgomery, demanding money. Montgomery gave defendant $2,000 cash, and defendant shot the victim again before shooting Montgomery.

Montgomery went downstairs to the basement where Marcellas Alexander and Timothy Salter were performing some remodeling for the victim, and Alexander called the police. When the police arrived, the victim was still alive. Either Alexander or the police asked the victim who shot him, but he was unable to make a sound and only moved his lips. When asked if he had

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

mouthed "Bald Head," the victim nodded his head "yes." Alexander asked the victim if he had mouthed "Raw Head," and the victim again nodded his head "yes." "Raw Head" is defendant's nickname. Two days after the shooting, the police prepared a photographic array for Montgomery, who viewed it while he was hospitalized. Montgomery selected defendant's photograph without hesitation.

Defendant testified at trial and admitted that he was involved in the drug trade, along with Alexander, who was a good friend. Before going to prison in 1993, defendant claimed that he left a large amount of cocaine with other people, anticipating that the drugs would be sold or distributed and he would receive some of the profits from Alexander. Defendant claimed that he never received payment, but Alexander denied owing him any money.

II. Ineffective Assistance of Counsel

Defendant argues that defense counsel was ineffective in numerous ways and that there is a reasonable probability that, but for counsel's serious errors, the outcome of defendant's trial might have been different. Where, as here, a defendant moves for a *Ginther*[1] hearing, but the motion is denied, review of an ineffective assistance of counsel claim is limited to mistakes apparent on the record. See *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *LeBlanc, supra* at 578. He must also overcome the presumption that counsel's performance constituted sound trial strategy. *Riley, supra* at 140. Where counsel's conduct involves a choice of strategies, it is not deficient. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

A. Trial Strategy

Defendant argues that counsel was ineffective because he adopted an unreasonable trial strategy whereby defendant admitted to being a drug dealer, knowing the victim, and having been in the victim's home—none of which was proven in the prosecutor's case-in-chief. We disagree.

[1] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). We will not assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The fact that a particular strategy is not successful does not prove that counsel was ineffective. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

In this case, it is undisputed that someone shot and killed the victim, and shot and robbed Montgomery. The two items of evidence implicating defendant were Montgomery's identification and the victim's dying declaration to which Alexander was a witness. However, once the trial court denied defense counsel's motions to exclude these two items, defendant's options for attempting to show reasonable doubt became limited. Defense counsel's decision to accuse Alexander of framing defendant to avoid a drug debt was not unreasonable, given that defendant was facing mandatory life in prison for first-degree murder. Therefore, defendant has not overcome the presumption of sound strategy.

B. Failure To Object To Alleged Prosecutorial Misconduct

Defendant contends that counsel was ineffective for failing to object to the prosecutor's alleged misconduct. We disagree.

Whether to object to an impropriety is a matter of trial strategy. *Matuszak, supra* at 58-59. As further discussed below, none of the instances of alleged prosecutorial misconduct in this case have merit. Therefore, counsel was not ineffective for failing to object on that basis.

Defense counsel could have objected to the improper rebuttal testimony of George Pemberton, but not because of misconduct by the prosecutor. However, counsel may have chosen not to object because the testimony confirmed defendant's continued involvement in the drug trade, and it did not tend to implicate him in the shooting. To the extent counsel erred in failing to object to Pemberton's testimony, considering the victim's dying declaration and Montgomery's identification of defendant as the shooter, defendant cannot show that, but for the alleged error, the outcome of his trial might have been different. See *Bell, supra* at 695. Therefore, reversal is unwarranted on this basis.

C. Failure To Object To Testimony That Defendant Was Incarcerated

Defendant claims that counsel was ineffective for failing to object when Salter mentioned that defendant was in custody. We disagree.

During direct examination, the prosecutor asked Salter whether he knew "Raw Head" or Cedric Gilmore. Salter responded, "no." The prosecutor then asked—presumably pointing at defendant—whether Salter had "[e]ver seen that man before?" Salter replied that he had seen defendant in jail, when he was detained for failure to appear in court the previous day.

Salter saw the victim mouth the words "Raw Head." Salter indicated that he had friends in common with defendant, and had seen defendant on a few occasions, but did not know him as

"Raw Head." The prosecutor asked whether he knew or would recognize Cedric Gilmore. Salter stated:

> I would know him today because when they—when they had—when they had me detained, we were in the same cell together. When they called his name, I knew then. But as far as just knowing his name or being able to pick him out of a line-up before today, I wouldn't have been able to do it.

When defendant testified, defense counsel attempted to ask him how long he had been in jail on these charges, but the prosecutor's objection was sustained before defendant answered.

In support of his present argument that defense counsel was ineffective for not objecting to Salter's testimony referring to defendant being in custody, defendant cites only cases involving the possibility that the presumption of innocence might be diluted when a defendant appears in court dressed in jail clothes. See *Estelle v Williams*, 425 US 501, 503-505; 96 S Ct 1691; 48 L Ed 2d 126 (1976); see also *People v Lewis*, 160 Mich App 20, 30-31; 408 NW2d 94 (1987). However, these cases are inapposite because a defendant's attire is a constant reminder to the jury that the defendant is in custody, whereas Salter's comment was brief and made in passing. Nonetheless, even if counsel erred by failing to object, defendant cannot show that, in light of Montgomery's identification and the victim's dying declaration, this brief comment might have affected the outcome of the trial. See *Bell, supra* at 695.

D. The Felon-In-Possession Charge

Defendant argues that defense counsel was ineffective for failing to move to sever the felon-in-possession charge, for failing to voir dire the jury on that charge, and for failing to request a cautionary instruction. We disagree.

MCR 6.121(B) states, "On a defendant's motion, the court must sever offenses that are not related as defined in MCR 6.120(B)." Under MCR 6.120(B)(1)(a), two offenses are related if they are based on the same conduct. In this case, the felon-in-possession charge arose from the same shooting as the remaining charges and, therefore, the offenses were related. Under the court rules, defendant was not entitled to have the felon-in-possession charge tried separately.

Before voir dire, the parties stipulated that defendant was a convicted felon and, therefore, ineligible to possess a firearm on the date of the offense. The court so informed the prospective jurors, adding that the only issue for trial concerning the felon-in-possession charge was whether defendant possessed a weapon on September 23, 2002. Defense counsel did not address the charge during voir dire. The decision whether to draw further attention to defendant's prior convictions during voir dire was a matter of trial strategy. Defendant has failed to show that counsel committed a serious error in failing to voir dire the jury on the issue. Further, in light of Montgomery's identification and the victim's dying declaration, defendant cannot show that this alleged error might have affected the outcome of the trial. See *Bell, supra* at 695.

In addition to the parties' stipulation, defendant admitted to two prior drug convictions as part of his trial strategy of accusing Alexander of framing him. The trial court did not give an instruction concerning the proper use of defendant's prior convictions, and there is no indication

that defendant requested it. However, whether to request a cautionary instruction is a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003). Defendant has failed to overcome the presumption of sound trial strategy.

E. Failure To Renew Motion To Exclude Dying Declaration

Defendant contends that counsel was ineffective for failing to renew his motion to exclude the victim's dying declaration at trial. Defendant maintains that Alexander's statement to the victim—that he was going to be all right—negated any showing that the victim knew of his impending death. We disagree.

As further discussed below, one of the requirements for admitting a dying declaration is that the declarant be conscious of his impending death. See *People v Siler*, 171 Mich App 246, 251; 429 NW2d 865 (1988); see also *People v Arnett*, 239 Mich 123, 131-132; 214 NW 231 (1927). Otherwise, the statement is mere hearsay. *Id.* at 131. However, the victim need not expressly acknowledge his impending death. *Id*. at 131-132. Rather, such knowledge can be inferred where "the nature of the wound is such that declarant must have realized his situation[.]" *Id*. at 132, quoting *Commonwealth v Puntario*, 271 Pa 501, 505; 115 A 831 (1922), in turn quoting 2 Wigmore, Evidence, p 1807.

In the present case, the victim was bleeding profusely from a gunshot wound in his chest. The victim was unable to speak, and barely moved his lips to mouth the words "Bald Head" or "Raw Head." He nodded his head in agreement when asked if he said "Bald Head," and assented again when asked if he said "Raw Head." He also nodded emphatically that he was certain. We infer the victim's knowledge that death was imminent from the nature of his wound, particularly the fact that he could not speak. The victim was likely also having problems breathing. Thus, it would have been futile for defense counsel to renew the motion to exclude the victim's dying declaration. Defense counsel is not required to make futile objections. *People v Wilson*, 252 Mich App 390, 397; 652 NW2d 488 (2002).

F. Failure To Present The Lineup Attorney As A Witness

Defendant contends that counsel was ineffective for not calling the lineup attorney, Madeline Jennings, to testify about Montgomery's identification of defendant in the photographic array, which thereby violated defendant's right of confrontation. Defendant also argues that the prosecutor used Jennings's comment during closing argument and, therefore, calling Jennings was crucial to undermine her credibility. We disagree.

During her closing argument, the prosecutor briefly mentioned Jennings's comment on the array sheet—that Montgomery chose defendant's photograph "without hesitation." However, Jennings was merely a witness to Montgomery's identification of defendant. Thus, Jennings's comment is not a statement of identification admissible under MRE 801(d)(1(C). Further, for the reasons discussed below, Jennings's statement was likely testimonial, and admitting it against defendant may have been a violation of his right of confrontation.

However, as stated previously, "[d]ecisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*,

supra at 368. To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome of the trial.

Whether to call Jennings to testify was a strategy decision. Defendant could have called Jennings and attempted to undermine her credibility in order to show that Montgomery could have chosen defendant's photograph by a process of elimination. However, defendant would run the risk that Jennings would reaffirm her comments that the lineup was fair and that Montgomery chose defendant's photograph without hesitation, thereby bolstering Montgomery's credibility. Additionally, her comment on the array sheet was cumulative of Sergeant Kenneth Gardner's testimony. Thus, defendant cannot show that the outcome of the trial might have been different if Jennings had testified.

III. Sentences for Assault and Armed Robbery Convictions

Defendant contends that the trial court abused its discretion in departing from the sentencing guidelines by using factors that had already been taken into account. We agree. Application of the legislative sentencing guidelines is a question of law to be reviewed de novo. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). In reviewing whether substantial and compelling reasons exist to justify a departure from the guidelines, "whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion[.]" *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). In the context of the sentencing guidelines, an abuse of discretion occurs when the trial court chooses an outcome falling outside this principled range of outcomes. *Id.* at 269. "If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court *shall* remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter." MCL 769.34(11)(emphasis added).

Defendant's sentencing information report shows that his legislative guidelines range for armed robbery was 171 to 285 months.[2] Nonetheless, defendant was sentenced to parolable life for the armed robbery and assault convictions. The trial court remarked on defendant's "extensive past felony record, [including] five misdemeanors." With respect to the assault and armed robbery sentences, the trial court recognized that "parolable life . . . is an option given by the legislature," and it imposed life sentences for the offenses "in light of the facts and circumstances in the defendant's past criminal history, which are not adequately reflected in the Sentencing Information Report[.]"

MCL 769.34(3) provides that "[a] court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling

[2] It appears that the guidelines were not separately scored for defendant's assault conviction, which defendant also challenges on appeal. However, the guidelines range for defendant's assault conviction would be the same as that for the armed robbery conviction, 171 to 285 months. See MCL 777.16d; MCL 777.16y; MCL 777.21(1); MCL 777.22(1); MCL 777.62.

reason for that departure and states on the record the reasons for departure." The statute further provides:

> The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. [MCL 769.34(3)(b).]

"[A] 'substantial and compelling reason' must be construed to mean an 'objective and verifiable' reason that '"keenly" or "irresistibly" grabs our attention'; is 'of "considerable worth" in deciding the length of a sentence'; and 'exists only in exceptional cases.'" *Babcock, supra* at 257-258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). "[T]he 'substantial and compelling' circumstances articulated by the court must justify the *particular* departure [imposed] in a case, i.e., 'that departure.'" *Babcock, supra* at 259, quoting *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001)(emphasis in original). "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." *Babcock, supra* at 262, 264.

Defendant's presentence investigation report indicates that he was convicted of armed robbery and felony-firearm in 1982, uttering and publishing in 1991, and conspiracy to deliver or manufacture less than 50 grams of cocaine in 1994. A defendant's prior record is taken into account by the prior record variables (PRV) of the sentencing guidelines, MCL 777.50 through MCL 777.57. In this case, defendant received a total of 77 PRV points, placing him at the highest level possible, PRV level F. MCL 777.62. Defendant received a total of 75 offense variable (OV) points, placing him at OV Level IV. *Id.* Defendant's criminal record was adequately taken into account by the sentencing guidelines and, therefore, a departure from the guidelines range on that basis was improper. Defendant's prior record, while objective and verifiable, is already adequately considered by the guidelines. Thus, it does not provide a substantial and compelling reason justifying the trial court's departure from the guidelines sentencing range. We therefore vacate defendant's life sentences for assault and armed and remand for resentencing. MCL 769.34(11).

We note that all charging documents, including the amended felony information, contain a notice of intent to seek a sentence enhancement under MCL 769.12, as a fourth habitual offender. Thus, under MCL 777.21(3)(c), the upper limit of defendant's guidelines range for these convictions could be doubled to account for his habitual offender status. Defendant's adjusted minimum guidelines range would then be 171 to 570 months.

IV. Dying Declaration

Defendant argues that the trial court erred in admitting, as a dying declaration, testimony that the victim mouthed the words "Raw Head" and nodded affirmatively when asked if he was the person who shot him. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Preliminary

issues of admissibility are reviewed de novo, but it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MRE 804(b)(2) provides:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

For a statement to be admitted as a dying declaration, (1) the declarant must have been conscious of impending death, (2) death must have ensued, (3) admission of the statement must be sought in a criminal proceeding against the alleged perpetrator, and (4) the statement must relate to the killing. *Siler*, *supra* at 251.

A. Nonverbal Conduct

Defendant contends that the alleged statements were too ambiguous, and that because the head nods were made by the victim, not by defendant, they cannot be considered adoptive admissions. Defendant further argues that the victim was not aware that he was going to die and, therefore, the statements were not admissible as dying declarations.

MRE 801(d)(2)(B), provides that "a statement of which the party has manifested an adoption or belief in its truth" is considered an admission of a party opponent and *not* hearsay. See also *People v Solmonson*, 261 Mich App 657, 664-666; 683 NW2d 761 (2004). While the parties have used the label "adoptive admission," MRE 801(d)(2)(B) does not apply because the victim/declarant is not a party. However, that alone does not render the victim's head nods inadmissible.

MRE 801(a)(2) defines a "statement" as including "nonverbal conduct of a person, if it is intended by the person as an assertion." This definition is not limited to statements made by the defendant. According to trial testimony, the victim was asked who shot him, but was unable to speak due to his wounds. Instead, the victim silently mouthed something in response, assented when the police asked if he said "Bald Head," and assented again when Alexander asked him if he said "Raw Head." This testimony indicates that the victim intended his nodding to be a statement, as provided by MRE 801(a)(2).

The facts adduced at trial show that the victim made the statements while conscious of his impending death, as discussed above. Moreover, the statements related to the killing, specifically the identification of the person who shot the victim/declarant. The victim died, and the prosecutor sought to use the statements against the alleged perpetrator. Therefore, the trial court did not abuse its discretion in determining that the statements were admissible as dying

declarations under MRE 804(b)(2). The meaning and weight of the victim's statements were a question of fact for the jury. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

B. Confrontation Clause

Additionally, defendant maintains that the victim's head nods were made in response to police questioning and, therefore, were testimonial. Accordingly, defendant reasons that admission of the victim's statements under any rule of evidence violates *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

The Confrontation Clause requires the unavailability of a witness and a prior opportunity for cross-examination before admitting testimonial evidence against a defendant. *Crawford, supra* at 68. The Court made it clear that, *regardless of the rules of evidence*, out-of-court testimonial statements are not admissible for their truth unless the defendant can test them by cross-examination. *Id*. at 50-51, 53-54, 61. Thus, in the present case, defendant correctly notes that if the victim's statements are controlled by *Crawford*, they are not admissible as an excited utterance, a present sense impression, or a dying declaration, *unless* they are admissible under an exception to defendant's right of confrontation.

1. Testimonial Statements

The trial court held that the victim's statements were statements of identification and, therefore, were not testimonial in nature. It did not address whether the statements were admissible under *Crawford*.

The *Crawford* Court noted that "'[t]estimony,' . . . is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford, supra* at 51, quoting 1 N Webster, An American Dictionary of the English Language (1828). Testimonial statements include "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id*. at 51-52 (citations omitted). Further, "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents a unique potential for prosecutorial abuse . . . ." *Id*. at 56 n 7. However, the Court declined to "spell out a comprehensive definition of 'testimonial.'" *Id*. at 68. Nonetheless, the Court concluded that it applies to police interrogations.

Contrary to the trial court's conclusion, *Crawford* does not support a finding that a statement of identification is not testimonial. In fact, a statement of identification can be the product of custodial interrogation, can be made at a hearing or in an affidavit, and can be made with an eye toward trial. See *United States v Mayhew*, 380 F Supp 2d 961, 963, 965 (SD Ohio, 2005)(tape recorded statements of identification made by the victim to a police officer, on the way to the hospital, were testimonial); but see *Wallace v State*, 836 NE2d 985, 996 (Ind App, 2005)(statements identifying the shooter made by the victim to an emergency medical technician, on the way to the hospital, and to two emergency room nurses, in the presence of a police officer, were not testimonial).

In *People v Geno*, 261 Mich App 624, 625, 631; 683 NW2d 687 (2004), this Court held that a child's statement to the executive director of the Children's Assessment Center during a Protective Services referral, was not testimonial. However, in *People v McPherson*, 263 Mich App 124, 132-133; 687 NW2d 370 (2004), this Court held that a coparticipant's statement to the police, identifying the defendant as the shooter, was testimonial. *Id*. at 133-135. In *People v Shepherd*, 263 Mich App 665, 671; 689 NW2d 721 (2004), reversed on other grounds 472 Mich 343; 697 NW2d 144 (2005), this Court also held that a witness's guilty plea allocution was testimonial. Conversely, a defendant's statements to visiting relatives, overheard by jail guards, were not testimonial. *Id*. at 675. In *People v Bell (On Second Remand)*, 264 Mich App 58, 63; 689 NW2d 732 (2004), this Court held that a coconspirator's statement to the police was testimonial. However, in *People v Walker*, 265 Mich App 530, 536-538; 697 NW2d 159 (2005), this Court held that a victim's statements to her neighbor (who wrote the statements down) and to the police, describing how her boyfriend attacked her and how she managed to escape by jumping off a second floor balcony, were *not* testimonial or made with an eye toward trial. *Id*. at 536-537. This Court has also found that the notes and lab report of a nontestifying serologist were testimonial. *People v Lonsby*, 268 Mich App 375; ___ NW2d ___ (2005). In *People v Bauder*, ___ Mich App ___; ___ NW2d ___ (Docket No. 256186, issued December 8, 2005), slip op, p 3, this Court found that the victim's statements to friends, co-workers, and the defendant's relatives in the weeks before her death were not testimonial.

The trial court in the present case erred by ignoring that investigation of criminal activity is a police officer's job. Thus, when a police officer asks a victim to identify the perpetrator, he does so for the purpose of locating, apprehending, and prosecuting the offender, i.e., with an eye toward trial. In many cases, civilians have the same goal in mind. In the present case, the victim's statements were testimonial because they were made on a solemn occasion (his death), to two police officers (and two civilians), in response to questioning, for establishing the identity of the perpetrator, in order to prosecute him. Any objective witness would expect that the victim's identification statement would be used at trial. Therefore, the trial court erred in concluding that the victim's statements were not testimonial in nature. Accordingly, we must decide whether the statements were admissible under some exception to defendant's right of confrontation. See *Crawford*, *supra* at 46, 56, 62.

2. Forfeiture By Wrongdoing

Without providing discussion, the *Crawford* Court noted that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability." *Crawford*, *supra* at 62, citing *Reynolds v United States*, 98 US 145, 158-159; 8 Otto 145; 25 L Ed 244 (1878). This Court recently relied on this language and upheld the admission of nontestimonial hearsay statements, adopting the reasoning of *United States v Garcia-Meza*, 403 F3d 364, 370-371 (CA 6, 2005). *Bauder*, *supra*, slip op, pp 3-6. Like the defendant in *Garcia-Meza*, the *Bauder* defendant confessed to killing the victim, and his argument at trial was that the killing was not planned or premeditated. *Id.* at 6, 9.

In the instant case, however, defendant denies having killed the victim. Courts have split on the issue of whether a court should determine that the defendant is responsible for the declarant's unavailability. See *Mayhew*, *supra* (holding that a court may determine by a preponderance of the evidence that the defendant is responsible for the declarant's unavailability,

regardless of whether the defendant is on trial for the crime that caused the declarant's unavailability); *State v Meeks*, 277 Kan 609, 614-616; 88 P3d 789 (2004)(holding that the doctrine of forfeiture by wrongdoing applied when there was a preponderance of the evidence that the defendant was responsible for the declarant's unavailability); but see *United States v Lentz*, 282 F Supp 2d 399, 426 (ED Va, 2002)(refusing to apply a preponderance of the evidence test to allow the evidence to be admitted to prove that the defendant killed the victim beyond a reasonable doubt).

In *Mayhew*, the court recognized, "for the court to conclude that the accused committed the act rendering the declarant victim unavailable, the court must also conclude that the defendant committed the criminal act charged, because those two acts are the same." *Mayhew*, *supra* at 967, quoting Friedman, *Confrontation and the Definition of Chutzpa*, 31 Isr L Rev 506 (1997). However, "[a]t least one circuit court and several prominent legal scholars have found forfeiture by wrongdoing applicable even though the act rendering the declarant unavailable is the identical offense of which the defendant stands accused." *Id.*, citing *United States v Emery*, 186 F3d 921, 926 (CA 8, 1999). Like the *Mayhew* court and the majority, I am mindful that it may, at first glance, seem troublesome to require a court to decide by a preponderance of the evidence the very question for which defendant is on trial. *Mayhew, supra* at 967. However, "equitable considerations demand that a defendant forfeits his Confrontation Clause rights if the court determines by a preponderance of the evidence that the declarant is unable to testify because the defendant intentionally murdered [him], regardless of whether the defendant is standing trial for the identical crime that caused the declarant's unavailability." *Id*. at 968.

I agree with the conclusion of the *Mayhew* Court, which stated, "[f]irst, as discussed in *Crawford*, this application of the forfeiture doctrine ensures that a defendant will receive no benefit from his wrongdoing." *Mayhew, supra* at 968. "Second, the jury will never learn of the judge's preliminary finding . . . 'unless knowledgeable in the law of evidence.'" *Id.*, quoting Friedman, p 523. "Moreover, the jury will use different information and a different standard of proof to decide the defendant's guilt." *Id.* (footnote omitted). "Third, analogous evidentiary situations permit a judge to determine preliminary facts even though the exact same facts may be necessary to the jury's final verdict." *Id.*

I would adopt the reasoning of *Mayhew* and hold that the victim's statement could have been admitted under the doctrine of forfeiture by wrongdoing. Montgomery's identification of defendant as the shooter was sufficient for the trial court to find that defendant was responsible for the victim's unavailability for cross-examination at trial. Suppressing the victim's statement would allow defendant to benefit from his wrongdoing. Accordingly, under the doctrine of forfeiture by wrongdoing, defendant is deemed to have waived his right of confrontation. I therefore conclude that, by admitting the victim's statement into evidence against defendant because it was not testimonial, the trial court reached the right result, albeit for the wrong reason. *People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

V. Identification

Defendant argues that the trial court erred in denying his motion to suppress Montgomery's hospital identification of defendant's photograph. A decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). A decision is clearly erroneous when, although

there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

An "identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998)(footnote omitted); see also *People v Winters*, 225 Mich App 718, 725; 571 NW2d 764 (1997). If the identification procedure is found to be impermissibly suggestive, a subsequent in-court identification by the same witness is inadmissible unless the prosecutor can show, by clear and convincing evidence, that the victim's in-court identification "had an independent basis." *Gray*, *supra* at 114-115; see also *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602, 603-604; 684 NW2d 267 (2004)(there is no right to counsel for an on-the-scene showup conducted before initiation of formal proceedings).

The suggestiveness of a lineup is to be evaluated in light of the totality of the circumstances. *People v Kurylczyk*, 443 Mich 289, 302, 311-312; 505 NW2d 528 (1993). A photographic lineup is impermissibly suggestive if differences in the photographs would lead to a substantial likelihood of misidentification by substantially distinguishing the defendant from the other participants, for example, because the defendant is the only subject with glasses, or the only subject with both a mustache and goatee. *Id.* at 305, 312. On the other hand, the procedure is not impermissibly suggestive—even if there are differences in composition, physical characteristics, and attire—if the array "contains some photographs that are fairly representative of the defendant's physical features and thus sufficient to reasonably test the identification." *Id.* at 304, quoting Sobel, Eyewitness Identification, § 5.3(a), pp 5-9 to 5-10. Otherwise, "[p]hysical differences generally relate only to the weight of an identification and not to its admissibility." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

At defendant's *Wade*[3] hearing, Sergeant Gardner testified that he compiled front view, face-only photographs of subjects who resembled defendant. Upon being shown the array, Montgomery immediately selected defendant's photograph and indicated that he was the shooter. Sergeant Gardner denied suggesting whom to select in any way. Sergeant Gardner testified that Jennings was present at the hospital and inspected the array before it was shown to Montgomery. She made no objections or suggestions. On the sheet from the photographic array, Jennings wrote that Montgomery "[p]icked out without hesitation number two," i.e., defendant's photograph.

Defense counsel attempted to demonstrate that, because there were differences between Montgomery's description of defendant and each of the other lineup participants, Montgomery could have selected defendant's picture by a process of elimination. In particular, defense counsel identified differences in the sizes of the mustaches and the degrees of baldness. He also asked whether Montgomery was on medication. Counsel never attempted to call witnesses. Therefore, there is no merit to defendant's argument that the trial court deprived him of the right to counsel by not allowing his attorney to call witnesses or present a case.

[3] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

In the present case, each of the photographs depicted a bald, black male, in his 30s or 40s, with a mustache. There are no characteristics that substantially distinguish defendant from the other participants. Thus, the lineup is not unduly suggestive. Defendant's argument concerning the appearance of other lineup participants—that only one other person had a very thick mustache, and he was older than defendant, and that other participants had very large eyes—goes to the weight and not the admissibility of Montgomery's identification. Accordingly, the trial court did not err in denying defendant's motion to suppress Montgomery's identification of defendant's photograph.

VI. Prosecutorial Misconduct

Defendant argues that the prosecutor committed misconduct that shifted the burden of proof, invaded the jury's credibility-finding province, and deprived defendant of a fair trial. Because defendant failed to specifically object to the prosecutor's questions and statements that formed the basis of the alleged misconduct, we review this claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error must have occurred; (2) the error was plain; (3) and the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), citing *Carines*, *supra* at 763. The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Abraham*, *supra* at 272-273.

A. Shifting The Burden Of Proof

Defendant first argues that the prosecutor improperly shifted the burden of proof by arguing that there was no evidence that defendant was known by any nickname other than "Raw Head," and that there was no evidence that anyone else committed the crime. We disagree.

As defendant argues, a prosecutor may not undermine the presumption of innocence by suggesting that the defendant has an obligation to prove anything, because such an argument tends to shift the burden of proof. See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). However, a prosecutor may argue that particular evidence is uncontroverted or undisputed. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). "Further, although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument with regard to the inferences created does not shift the burden of proof." *Id.* at 521.

During her closing argument, the prosecutor argued that the evidence showed that defendant murdered the victim, and robbed and shot Montgomery. Montgomery was the only living eyewitness, and he identified defendant as the shooter. Alexander spoke to the victim before he died, and the victim "mouthed the identification of his killer." The prosecutor continued:

> And all the evidence points to one person. It points to [defendant], it points to Raw Head. There is no testimony that the defendant is not known as anything else but Raw Head. There's no testimony that anybody else did it other than the defendant seated here.

The prosecutor then summarized the evidence presented at trial.

In this case, defendant advanced the theory that someone else committed the crime and presented some evidence in support of that theory, including his own testimony. The prosecutor merely commented that the evidence failed to show what defendant posited, i.e., to either exonerate defendant or show that someone else committed the crime. The prosecutor made permissible comments on the evidence presented at trial, including its weight and credibility. The comments did not improperly shift the burden of proof and did not deprive defendant of a fair trial.

B. Voir Dire

Defendant claims that the prosecutor improperly appealed to the sympathies and emotions of prospective jurors by asking them during voir dire to place themselves in the victim's shoes. We disagree.

It is improper for the prosecutor to appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). During voir dire, the prosecutor told the prospective jurors that this was real life, not television, and that they were to base their decision on the evidence, evaluated in light of their common sense and life experiences. The prosecutor continued:

> Okay. This case is going to—as you heard, is going to be based upon an identification, identification of the defendant, and would anybody have a problem with convicting based on one person's identification? Would you want more, would anybody require the prosecution to prove more?

Some prospective jurors answered affirmatively. The prosecutor then asked one prospective juror:

> You said that you would want more. For example, let me say that you and I were—were walking along the street, there's nobody else around, and I take a gun and I pull it on you and I take your purse, all right, and off I go. You got to look at me, right?

The prosecutor asked whether, if the prospective juror filed a police report concerning the robbery and testified at the perpetrator's trial, she would want the police and the jury to believe her, even if there was no other evidence. The prosecutor noted that, if they were chosen as jurors, they would need to base their decision on the evidence, whether there was one witness or a million witnesses, even if there was no trace hair and fiber evidence as there often is on television. Jurors would also need to follow the law, as explained to them by the judge, even if they did not agree with it.

The prosecutor then returned to the prospective juror in question and asked her whether she would expect people to believe her identification of the fictitious mugger even if she could not remember what color sweater he was wearing. She said, "no." The prosecutor then asked jurors about the color of the carpeting, if any, in the elevator, to demonstrate how some details may not appear relevant at the time someone perceives them.

In this case, however, the prosecutor's comments do not constitute an appeal to the jury to sympathize with the victim. She was merely attempting to ascertain that prospective jurors were not going to demand that she prove her case beyond all doubt, or to a moral certainty. She did not ask prospective jurors to place themselves in the victim's position. We find no misconduct.

C. Commenting On Witness Credibility

Defendant argues that the prosecutor improperly asked him to comment on Alexander's credibility. We disagree.

It is improper for the prosecutor to ask a witness to comment on the credibility of another witness. *Ackerman, supra* at 449. During cross-examination, the prosecutor asked defendant whether he heard Alexander testify that they had been friends for about 20 years and had gone to prison together. The prosecutor continued:

> *Q*. And you saw him when he came up here and identified you, he almost—he actually did start crying. Did you see that?
>
> *A*. I guess I saw what you call a cry, yes.
>
> *Q*. You saw it, didn't you?
>
> *A*. I didn't actually see tears, no.
>
> *Q*. Mr. Alexander said he didn't want to be here. Mr. Alexander didn't say you were the shooter, did he?
>
> *A*. I don't know, no.

Although the prosecutor's questions may test the bounds of propriety, any potential prejudice could have been cured by a timely requested instruction. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Therefore, the prosecutor's conduct did not deprive defendant of a fair trial.

D. Improper Rebuttal Evidence

Defendant argues that the prosecutor presented improper rebuttal evidence. We disagree.

"Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996), quoting *People v De Lano*, 318 Mich 557,

570; 28 NW2d 909 (1947). "The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination." *Figgures*, *supra* at 399. The test of whether rebuttal evidence was properly admitted is whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. *Id.* "As long as evidence is responsive to material presented *by the defense*, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Id.* (emphasis added). However, "a denial cannot be elicited on cross-examination simply to facilitate the admission of new evidence . . . ." *Id.* at 401; see also *People v Losey*, 413 Mich 346, 352; 320 NW2d 49 (1982). Thus, where the defendant raises an issue "*before* cross-examination," cross-examination by the prosecutor does "inject a new issue into the case, instead, it serve[s] as the basis for a thorough and proper exploration regarding the veracity of defendant's prior testimony." *Figgures*, *supra* at 401 (emphasis original).

In the present case, defendant did not testify on direct examination about his whereabouts on the day of the killing, although he denied being at the victim's home and committing the crime. On cross-examination, the prosecutor asked defendant whether he knew Pemberton. Defendant said, "[n]o." The prosecutor again asked defendant whether he had been with Pemberton on the day of the offense. Defendant again denied knowing Pemberton. The prosecutor asked defendant whether he denied being with anyone from the Detroit area on the day of the crime. Defendant said he did not know whom he was with, but it was not Pemberton.

On rebuttal, Pemberton testified that he and defendant smoked crack cocaine together several hours before the shooting. He did not know where defendant went after that. Pemberton's testimony was improper. The prosecutor elicited a denial on cross-examination and introduced damaging testimony solely to rebut that denial. Pemberton's testimony was not relevant to defendant's whereabouts at the time of the offense. However, a finding of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *Noble*, *supra* at 660. There is no indication that the prosecutor acted in bad faith in introducing Pemberton's testimony. Further, any resulting prejudice could have been prevented by a timely objection and a cautionary instruction. *Callon, supra* at 330. Therefore, while Pemberton's rebuttal testimony could be considered plain error, it did not amount to prosecutorial misconduct that deprived defendant of a fair trial. Reversal is not warranted.

/s/ Harold Hood